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## MEMORANDUM

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**DATE:** JUNE 16, 2020

**TO:** NYRC ASSESSORS

**FROM:** DR. ROCCO GUERRIERO, PRESIDENT

**CC:** GRACE MA, VICE PRESIDENT, OPERATIONS & BUSINESS DEVELOPMENT

**SUBJECT: FACTS AND ASSUMPTIONS IN MEDICAL-LEGAL REPORTS**

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Per Rule 11-6(1)(f)(i) of the Supreme Court of British Columbia, medical-legal reports submitted to the courts are required to include the Facts and Assumptions upon which the medical expert has based their diagnosis, opinion and recommendations. The importance of this requirement has recently been highlighted in the ruling *Larson v. Bahrami*.

The following was referenced in that case ruling:

*"As explained in Rowe v. Bobell Express Lt., 2003 BCSC 472 at para. 12, '[t]he facts, known or assumed, should be immediately apparent', and the reader should not have to 'cull them' out of the report or supporting documents. This is important because an expert's opinion is only useful insofar as the facts and assumptions on which it is based are established in evidence."*

We would like to suggest the following best practice approach to preparing the Facts and Assumptions section of your medical-legal reports.

1. A statement should set out the general assumptions made in your report. Usually this references the general presentation of the examinee, the history the examinee has provided, and the accuracy of the medical records. Having said that, do not provide an opinion on the veracity of the examinee. This is not our mandate (*Maras v. Seemore, 2014*) and (*Thibeault v. MacGregor, 2013*).
2. A series of brief bullet points should then list out the specific facts and assumptions of the case that led you to your diagnosis, opinion and recommendations. These should be

based on the key details of the case that led you to your overall opinion. This should include important parts of the history and your examination. You could copy and paste some of the key facts of your report into the facts and assumption section.

Below is an example of the two parts of a Facts and Assumptions section mentioned above:

### 1. General statement

I am basing my opinion on the assumption that the clinical records that were forwarded to me are accurate and complete (see below for further clarification). I am also assuming that Ms. X appeared in her usual state and reported her history to the best of her ability when interviewed.

### 2. Detailed facts and assumptions

- Date of birth of examinee – age of the person is relevant, e.g. paediatric vs. geriatric.
- Occupation of examinee – this is relevant with respect to the pre-accident physical demands and their present work capacity or functional status.
- Past medical history – this may be relevant to the issue of causation and whether the accident aggravated and materially contributed to their injuries.
- Accident history – the mechanism of injury is an important factor in determining accident-related injuries and also to identify onset of symptoms and causation.
- Past medical records and imaging may be significant.
- Post-accident medical imaging may be relevant.
- History from the examinee identifying onset of symptoms, pre-accident level of function vs. post-accident level of function, activities of daily living and any activity limitations identified.
- Physical or Mental and Behavioural examination – any pertinent assessment findings that support your diagnosis, prognosis and opinions.
- Documentation highlights may be pertinent to your opinion. E.g. Family doctor's clinical notes and records (CNR) may or may not contain pre-existing musculoskeletal complaints or details of the accident and onset of symptoms. Some of this detail can be considered a fact.
- Letter of instruction (LOI) - read the LOI right away to determine if there are agreed facts and assumptions or to identify relevant issues that need to be assessed and addressed in your report. Also the LOI may contain issues that will require your opinion, please qualify your answers to the questions and provide your rationale. Include the "because, because, because". This is very important to summarize in your facts and assumptions.
- Research – reference any papers that support your opinion if relevant and necessary.

We understand that compiling a thorough and comprehensive “Facts and Assumptions” section in your report can be challenging but it is something you must do as an expert witness tasked in assisting the court. Failure to do so can lead to the inadmissibility of your report as per Rule 11-6(1)(f)(i) of the Supreme Court of British Columbia. So please be thoughtful and put a little extra effort into presenting your medical opinion for the purposes of assisting the court.

General tips to help with your formulation:

- 1) Formulate the Facts and Assumptions section after you have dictated/completed the report. Once you have transcribed all the facts of your report and your opinion(s), it is much easier to compile the relevant and concise points of your report.
- 2) Think of Facts and Assumptions as similar to preparing an executive summary. Read the Letter of Instruction (LOI) from retaining counsel right away to determine if there are agreed facts and assumptions or to identify relevant issues that need to be assessed and addressed in your report.
- 3) When you are thinking about “facts”, think about things that you “know”. How you “know” them is because of evidence with which you are presented. The difficulty is that in some cases the evidence is conflicting or inadequate to draw conclusions from. Also draw a distinction between “facts”, which are things you “know” and “inferences” which are conclusions or findings you draw from the evidence.
- 4) Consider contested facts. Sometimes the examinee and treating or examining practitioners disagree on certain events. For example, the examinee could tell you that they lost consciousness after the accident. However, an IME report from a previous medical specialist did not report a loss of consciousness in their report. You can mention this discrepancy, but leave it to the trier of fact to determine what actually happened. You can opine based on a reasonable assumption, but state that in your report..
- 5) Think about making inferences from those facts that you know in the analysis portion of your report. For example, given the first presentation of neck symptoms 30 days after the subject accident, on a balance of probabilities, there is not a causal connection between the two. Don't call that a “fact” because it is not something that you know directly from the evidence, but rather a conclusion you are arriving at by applying your expert knowledge to the things you know. In this section, deal with competing inferences that you might have in cases where there are contested facts that lead to different conclusions. That said, if research establishes that there is usually a short timeline between a precipitating event and the appearance of musculoskeletal symptoms, that may be a “fact” that you can identify as such. It does not flow from the evidence, but it may be cited from research.
- 6) When you think about “assumptions”, think about things that you don't actually know just by looking at the evidence. One example is that the medical records that have been provided are complete. In some cases, you might want to assume that they are accurate

as well. But you could have cases where you can't really assume that because there are inconsistencies. So, you may not necessarily always state that this is an assumption.

- 7) A second category of "assumption" would be the kind that you are asked to make in the LOI you are given. That is more straightforward if you are given those kinds of instructions.
- 8) Another category of assumption would be things that you haven't been told and which are not directly drawn out of the records you have reviewed. This may be a background that you need in order to make a conclusion. For example, it may be an assumption that the examinee was of good general health with no prior history of neuromusculoskeletal problems prior to the accident. You could make that assumption in the event there is no evidence to the contrary, even if you haven't been told this. You may need to make this inference in order to draw a conclusion. If you make that statement, then it would be clear that your analysis might change in the event your assumption were challenged at a later date or needed to be corrected.
- 9) When in doubt about what is a fact and what is an assumption, contact us! We will happily assist.

Feel free to contact me at [drguerriero@nyrc.ca](mailto:drguerriero@nyrc.ca) if you have any questions or concerns on the above. Thank you.